Questions Presented

1. Did the admission of testimony from Morris Nellum concerning statements made by petitioner's coconspirator, Murray Hooper, violate petitioner's constitutional right to confrontation?

2. Was petitioner denied a fair trial or due process of law when his motion to sever his trial from that of codefendant Cruz was denied?

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STATEMENT OF THE CASE

In 1975, William Patrick Redmond and Ronald Lukezic, who had worked together in the printing business for almost 20 years, started their own printing company, which they called Graphic Dimensions. Their company was very successful. Pat Redmond handled the printing end of the business while Ron Lukezic took care of the sales.

In the summer of 1980, both Redmond and Lukezic were discussing a proposal for a large amount of business from Las Vegas. The contacts for this proposal were Artie Ross and Robert Charles Cruz. Mr. Ross was the brother of Joyce Lukezic, who was Ron Lukezic's wife. Mr. Cruz was an associate of Mr. Ross and had a business office in the same building as Mr. Ross. Mr. Ross was also associated with a man named Arnold Merrill. The two had been friends for years and at one point had jointly operated a store selling firearms and Indian jewelry. Mr. Merrill became acquainted with Mr. Cruz in April or May of 1980.

In September of 1980, Mr. Merrill met with Mr. Cruz at the latter's request. Mr. Merrill was accompanied by Michael Gill, and Cruz asked them if they would be interested in doing a job for him. Cruz then showed Merrill a photograph of Pat Redmond and asked him if he would be interested in "whacking out" Mr. Redmond for $10,000. Merrill declined the offer, so Cruz asked if Merrill would rather drive a car for the killers for $5,000. When Merrill again declined, Cruz told him that it would be easy, but Merrill and Gill walked out.

Merrill spoke with Cruz again in late November of 1980. Cruz told Merrill that he was going to take over half of Graphic Dimensions. He intended to accomplish this

by "getting rid" of Mr. Redmond. Cruz also stated that he would take over the entire company 6 months after the death of Mr. Redmond by "whacking out" Ron Lukezic. In this same conversation, Cruz mentioned a problem he was having with Artie Ross, and Merrill suggested that petitioner might be willing to help. Merrill later introduced petitioner to Cruz.

Around December 3, 1980, Cruz asked Merrill to go to the airport with him. When the two men arrived at the airport, they went to meet an incoming flight from Chicago. William Bracy and Murray Hooper were on the flight, and Cruz and Merrill took them to Cruz's home. They subsequently took Bracy and Hooper to the Holiday Inn in Scottsdale, and Cruz gave Bracy a key to one of the rooms.

Bracy and Hooper stayed in Arizona for several days. During this time, Merrill drove the two men around the valley on several occasions. On one occasion, Merrill took Bracy and Hooper to a gun store owned by Merrill's brother, Raymond Kleinfield. Hooper picked out a large hunting knife and told Kleinfield to put it on Cruz's account. Kleinfield gave Bracy a paper bag containing three pistols. Cruz had purchased the three weapons from Kleinfield a few days earlier. At another time, Merrill drove Bracy and Hooper by Graphic Dimensions and the Redmond home. Cruz regularly called Merrill during this time to check on the activities of Bracy and Hooper and to give Merrill orders. Bracy and Hooper eventually moved into Merrill's home, where they were introduced to petitioner.

On the evening of December 6, 1980, Cruz called Merrill and told him to bring Bracy and Hooper to his office.

There, Cruz told the two men that they had to "get the man fast" because he was going out of town on a camping trip. As a result, Merrill drove Bracy and Hooper to a bar that Pat Redmond was known to frequent. When Mr. Redmond came out and drove away in his car, Merrill followed. Near the intersection of Central and Van Buren in downtown Phoenix, Hooper attempted to shoot Mr. Redmond. This attempt failed because Merrill swerved his car away from the Redmond vehicle. The next day Cruz was very upset with Merrill over this failure.

Shortly afterwards, Bracy and Hooper moved out of Merrill's home, but left behind one of the three guns. Petitioner called Merrill later that day and asked for the gun. Early in the morning of December 8, 1980, petitioner and Bracy came to Merrill's home. Petitioner told Merrill that he was "changing sides" and joining up with Bracy and Hooper. Bracy warned Merrill to stay out of the way. Later that day, Merrill went to Cruz's office to look for his brother. While he was waiting, Joyce Lukezic came in and asked Cruz why Mr. Redmond had not been taken care of. Cruz replied that Redmond would be dead by Christmas.

On December 30, 1980, Cruz again called Merrill and left a message for petitioner. Cruz instructed Merrill to tell petitioner to pick up a package at Ray Kleinfield's store and to pick up Bracy and Hooper at the airport. Merrill called petitioner and relayed this message from Cruz. The following morning petitioner, Bracy, and Hooper came to Merrill's home and stayed briefly.

At around 6:00 p.m. on December 31, 1980, Pat Redmond and his wife, Marilyn, were at home preparing for a small New Year's Eve party. Mrs. Redmond's mother, Helen Phelps, who was visiting for the holidays, was also present.

Shortly before 7:00 p.m., Mrs. Redmond heard a knock at the door and her husband went to answer it. Mrs. Redmond thought that the guests were arriving, so she went to her bedroom to get her cigarettes and some money. (The Redmonds had planned on playing cards with their guests that evening.) She next heard her husband calling her to come to the door. She went and saw a black man holding a gun on Mr. Redmond. The man grabbed her and ordered her to tell Mrs. Phelps to go into the master bedroom. He then took her into the living room and told her to close the drapes. When they returned to the family room, Mrs. Redmond saw a white man sitting next to her husband. The white man had his hand inside a brief case, apparently holding a gun on Mr. Redmond.

Mrs. Redmond's captor then took her into the master bedroom, where she saw her mother lying face down on the bed. There was also another black man in the room, and the two intruders relieved Mrs. Redmond of her jewelry. Eventually, the white man and Mr. Redmond came into the bedroom, and the intruders ordered Mr. and Mrs. Redmond to join Mrs. Phelps on the bed. The three victims were then bound and gagged, and Mrs. Redmond heard someone say, "We don't need these two anymore." The next thing Mrs. Redmond heard was the sound of gunshots.

Both Mr. Redmond and Mrs. Phelps died from gunshot wounds to the head. Mr. Redmond's throat was slashed. Although she also was shot in the head, Mrs. Redmond survived the attack and crawled to the family room. Two guests arriving for the party at around 8:00 p.m. found Mrs. Redmond lying on the family room floor.

As a result of this incident, the state filed a complaint charging petitioner with two counts of

first-degree murder, one count of attempted first-degree murder, three counts of armed kidnapping, three counts of armed robbery, and one count of armed burglary. The complaint also charged petitioner with seven other felonies in connection with another incident. Following a preliminary hearing, petitioner was held to answer on the charges, and an information was filed. On June 19, 1981, the state filed a second complaint. This document charged petitioner and Cruz with conspiracy to commit first-degree murder. The document also charged Cruz with the same felony charges arising out of the Redmond incident that the previous complaint had charged against petitioner. Following another preliminary hearing, Cruz and petitioner were held to answer, and a second information was filed.

Prior to trial, petitioner filed a motion seeking to sever the last seven counts in the first information. This request was ultimately granted. Cruz later filed a motion asking that he and petitioner be tried separately, and counsel for petitioner joined in that motion. The prosecutor next moved to consolidate both charging documents and both defendants for trial. Following a hearing, the trial court denied the motion to sever and granted the motion to consolidate.

The matter proceeded to trial on November 9, 1981. At that trial, Arnold Merrill testified for the prosecution and detailed the conspiracy to kill Mr. Redmond and take over Graphic Dimensions. Merrill identified Cruz as the originator of the plot, and identified petitioner, Bracy, and Hooper as the men Cruz hired to carry out the killing. According to Merrill, the three killers were to receive money and control of the drug traffic in South Phoenix as payment for the murder of Mr. Redmond. Marilyn Redmond

also testified for the prosecution, and she identified petitioner, Bracy, and Hooper as the three men who had entered her home and killed her mother and her husband. After a lengthy trial, the jury found petitioner and Cruz guilty on all counts.[1]

Pursuant to Ariz.Rev.Stat.Ann. § 13-703, the trial court held an aggravation-mitigation hearing on January 8, 1982. The trial court found the existence of three aggravating circumstances (that petitioner created a grave risk of death to others in the commission of the offenses, that petitioner committed the offenses as consideration for or in expectation of the receipt of anything of pecuniary value, and that petitioner committed the offenses in an especially heinous, cruel, or depraved manner) and no mitigating circumstances sufficiently substantial to call for leniency. Consequently, the trial court imposed the death penalty for the murders of Mr. Redmond and Mrs. Phelps. The trial court also imposed a life sentence for the conspiracy conviction and prison terms of 21 years for each of the remaining counts. The sentence for the burglary conviction was ordered to run consecutively to that imposed in the conspiracy conviction. The trial court also ordered that the kidnapping sentences run concurrently with each other but consecutively to the burglary sentence, that the armed robbery sentences run concurrently with each other but consecutively to the kidnapping sentences, and finally that the attempted murder sentence run consecutively to the armed robbery sentences. Mr. Cruz received identical sentences.

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1. Bracy and Hooper were subsequently tried and convicted for their role in the killings. Both received the death penalty and their appeals are pending before the Arizona Supreme Court.

Both petitioner and Cruz appealed their convictions and sentences to the Arizona Supreme Court. Among other things, petitioner argued that his right to confrontation was violated by the admission of hearsay statements under the coconspirator exception and that the refusal to sever his trial from that of Mr. Cruz denied him a fair trial and due process of law. The Arizona Supreme Court rejected these claims and affirmed petitioner's convictions and sentences. State v. McCall, No. 5482, slip op. at 3-7 (Ariz.Sup.Ct., Nov. 9, 1983), supplemental opinion, slip op. at 3-6 (Ariz.Sup.Ct., Feb. 14, 1984). However, the Arizona Supreme Court reversed Mr. Cruz' convictions and remanded his case for a new trial. State v. Cruz, ___ Ariz.____, 672 P.2d 470 (1983).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

ARGUMENTS

I

THE ADMISSION OF TESTIMONY FROM MORRIS NELLUM CONCERNING STATEMENTS HOOPER HAD MADE AFTER THE KILLINGS DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHT TO CONFRONTATION.

Petitioner contends that the admission of Morris Nellum's testimony violated his right to confrontation, and asks this Court to grant certiorari to resolve the tension between the coconspirator exception to the hearsay rule and the confrontation clause of the Sixth Amendment and to settle a dispute among the various federal circuit courts arising out of this tension. This Court has held that the Sixth Amendment's right of an accused to confront the witnesses against him is a fundamental right made obligatory on the States by the Fourteenth Amendment.

Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). This Court has also recognized that the confrontation clause is not violated by the admission of extra-judicial declarations if, under the circumstances, the trier-of-fact is afforded a satisfactory basis for evaluating the truth of the extra-judicial declarations. Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). Respondent submits that no violation of the confrontation clause resulted from the admission of Mr. Nellum's testimony.

During its case-in-chief, the prosecution called Morris Nellum, a resident of Chicago, Illinois, and a long-time friend of Murray Hooper. Mr. Nellum testified that in the summer of 1980 he met a man named William Bracy. Mr. Nellum worked as a driver for Hooper, and in late November or early December of 1980, Hooper told Nellum that he and Bracy were going to Arizona. When Bracy and Hooper returned to Chicago, Nellum picked Hooper up at Bracy's house and drove him home. Mr. Hooper had a lot of money with him, and he told Nellum that he had gotten the money in Arizona. Hooper also said that he had gone to Arizona to kill a man, but failed to do so because their driver "got scared." In reference to the money he had, Hooper said that it was partial payment for the killing, and that he would receive the rest after he had finished "the job."

Some time after this, Nellum met with Bracy and Hooper in a Chicago tavern. Bracy mentioned that a man named Cruz had called him and told him that he had made arrangements for Bracy and Hooper to go back to Arizona. Bracy and Hooper told Nellum that they were going back to Arizona around New Year's to kill someone. In exchange for the killing, Bracy and Hooper were to receive money and part of "the business."

On December 30, 1980, Nellum drove Hooper to Bracy's house. Nellum next heard from Hooper early in the morning of January 1, 1981. As a result of a phone call from Hooper that morning, Nellum drove to Bracy's house and picked Hooper up. When Hooper got into the car, he showed Nellum two rings, a watch, and a pistol. Mr. Hooper said that he had taken these items from the house of three people he had killed in Arizona. According to Hooper, he and two others had done the killings, and one of the two others was an ex-policeman.

On January 2, 1981, Nellum went to Hooper's home. Hooper said that he was waiting for the rest of his money and was trying to contact the people responsible for paying him. The next week after January 1, 1981, Nellum met with Bracy and Hooper in another Chicago bar. At this meeting, Nellum again saw the jewelry that Hooper had had in his possession on January 1, 1981. Bracy had another ring and watch that he said he had got in Arizona. Hooper took the jewelry and pawned it, splitting the proceeds with Bracy.

Two days to a week later, Nellum was at Hooper's apartment. Hooper was very upset that he had not been paid yet and he mentioned that he might kill someone.

In the early part of January of 1981, Hooper called Nellum and asked for a ride downtown. Hooper said that he had received a call telling him that he was going to be paid. Nellum took Hooper downtown, but the office where Hooper was to be paid was closed. After Hooper received a second call, the two returned to the office a few days later. Hooper told Nellum that he was expecting a call and had to be at the office by 5:00 p.m. Hooper went into the building and returned to Nellum's car less than an hour later. After giving Nellum $50, Hooper said that he had

received part of his money and that "the fat man" had called him. Hooper also said that the rest of his money would be coming later.

Dutton v. Evans, supra, deals with the exact issue petitioner raises. Evans and two other men, Truett and Williams, were charged with the murders of three police officers. Truett received immunity in exchange for his testimony against Evans and Williams. At Evans' trial Truett detailed his role and the roles of Evans and Williams in the murders of the officers. Another of the prosecution's 20 witnesses was a man named Shaw. Shaw and Williams had been in federal custody together at the time the state murder charges were filed against Williams. Shaw testified that after Williams was returned to federal custody following his arraignment on the state murder charges, he had asked Williams, "How did you make out in court?" According to Shaw, Williams had responded, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." This testimony was admissible under Georgia's "co-conspirator exception" to the hearsay rule. In addressing Evans' claim that the admission of this evidence violated his right to confrontation, a plurality of this Court first noted that Shaw's testimony was not "crucial" or "devastating" but was of peripheral significance at most, and that the most important witness was Truett. The plurality went on to discuss four relevant factors concerning the testimony. First, the statement by Williams contained no express assertion about past fact, and consequently carried on its face a warning to the jury against giving the statement undue weight. Second, Williams' personal knowledge of the identities and roles of the other killers was abundantly established by Truett's

testimony and Williams' prior conviction.[2] Third, the possibility that Williams' statement was founded upon faulty recollection was remote in the extreme. Fourth, the circumstances under which Williams made the statement (the statement was spontaneous and against his penal interest) were such as to give reason to suppose that Williams did not misrepresent Evans' involvement. Thus, a plurality of this Court concluded that the admission of this testimony did not violate the confrontation clause. A fifth member of this Court, Justice Harlan, concurred in the result but maintained that the due process clause and not the confrontation clause should be the standard for testing rules of evidence.

For any number of reasons, the same conclusion should be reached in this case. First, Arizona's "co-conspirator exception" (Rule 801(d)(2)(E), Arizona Rules of Evidence) is narrower than the Georgia exception at issue in Dutton. Petitioner argues that the conspiracy was over at the time Hooper made his statements to Nellum, but the evidence presented at trial contradicts this notion. The substantive crime in this conspiracy was the murder of Pat Redmond, and Cruz arranged to hire and pay the killers. Cruz initially offered Arnold Merrill $10,000.00 to murder Pat Redmond. When Merrill refused this offer, Cruz brought Bracy and Hooper in from Chicago. On their first trip to Arizona, Cruz gave Bracy a pile of $100.00 bills. On December 9, 1980, petitioner told Merrill that he was joining Bracy and Hooper. On January 2, 1981 (2 days after the murder of Mr. Redmond), petitioner came to Merrill's

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2. Petitioner appears to argue that this reference to Williams' prior conviction means that Williams had been convicted of the murders at the time he made the statement to Shaw. This is not so, as a reading of Dutton makes clear.

home and told him about his role in the killings. Petitioner said that he was going to be paid $10,000.00 for killing Mr. Redmond. Shortly before petitioner's preliminary hearing in mid-January of 1981, Cruz met with Merrill and asked him to deliver $10,000.00 to petitioner's wife. Merrill declined this offer. Thus, money was petitioner's motive for participating in this conspiracy, and the receipt of that money was one of the conspiracy's main objectives as far as petitioner was concerned. The same can be said for Bracy and Hooper. Cruz was the man who would pay the killers. The evidence referred to above supports the conclusion that neither petitioner nor Hooper had been paid by mid-January of 1981. Of equal importance is the evidence that Cruz had not abandoned the killers, but was still attempting to pay them for their "work." Also, the prosecution made it clear in the charging document that the conspiracy did not end with the death of Mr. Redmond. The information alleged that the conspiracy lasted from September of 1980 to February of 1981. Under these circumstances, even though the murder of Mr. Redmond had been accomplished, the conspiracy was still continuing at the time Hooper made his statements to Mr. Nellum. Petitioner's claim that the statements do not fit within the Arizona "co-conspirator exception" is meritless.

Second, Nellum's testimony was of peripheral significance at most when viewed in light of the testimony of Arnold Merrill and Marilyn Redmond. Petitioner's claim that Mrs. Redmond initially identified petitioner as a black man is misleading for the additional facts it fails to state. Mrs. Redmond's "misidentification" of petitioner occurred shortly after the shootings. At the time Mrs. Redmond was lying flat on her back on her living room

floor and was being attended to by emergency medical personnel. The bullet wound to her head made it difficult for her to speak and she was lapsing in and out of consciousness. A police officer was questioning her about her assailants, and Mrs. Redmond first stated that three Negro males had assaulted her. However, she almost immediately corrected herself and said that two of the assailants were Negroes and the third a white man. Mrs. Redmond also gave an accurate, albeit general, description of petitioner, the clothes he was wearing, and the briefcase he was carrying. Police later seized clothing and a briefcase matching this description from petitioner's home. Police officers also found certain receipts in petitioner's car that reflected the purchase of the adhesive tape that had been used by the killers to bind the Redmonds and Mrs. Phelps. Petitioner's efforts to belittle the weight of the evidence against him are futile.

Third, Hooper's personal knowledge of the identities and roles of each of the murderers was abundantly established by the testimony of Marilyn Redmond and Arnold Merrill. In addition, Hooper himself was ultimately convicted for the murders of Mr. Redmond and Mrs. Phelps.

Fourth, the possibility that Hooper's statement was based upon faulty recollection is remote in the extreme. He was speaking of recent and still ongoing events, and his statements were in part spontaneously fueled by his anger at not being paid.

Fifth, the circumstances under which Hooper made the statements were such as to give reason to suppose that Hooper did not misrepresent petitioner's involvement. Hooper's statements were clearly against his own penal interest. He made no attempt to minimize his own

involvement or enlarge the involvement of others. His reference to petitioner was fleeting: he did not even refer to petitioner by name.

In short, the jury in petitioner's case was afforded a satisfactory basis for evaluating the truth or falsity of Hooper's statements. Petitioner exercised his right to confrontation on the factual question whether Nellum had actually heard Hooper make the statements, so the jury was well aware of the considerations (boasting to an old crony, etc.) that petitioner makes much of in his petition. Therefore, the admission of Nellum's testimony did not violate petitioner's right to confrontation.

Petitioner's complaints about a split among the federal circuit courts in the wake of Dutton are chimerical. Both the United States Court of Appeals for the Ninth Circuit and the Arizona Supreme Court follow the case-by-case analysis suggested by Dutton. See, e.g., United States v. Snow, 521 F.2d 730 (9th Cir. 1975); State v. McCall, supra (supplemental opinion).

As for petitioner's suggestion that this Court should rethink the principles set forth in Dutton, respondent submits that petitioner has presented no basis for doing so. Petitioner's fears about the unreliability of coconspirator's statements can be dealt with under the individual, case-by-case analysis favored by Dutton.

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II

PETITIONER WAS NOT DENIED A FAIR TRIAL OR DUE PROCESS OF LAW WHEN HIS MOTION TO SEVER HIS TRIAL FROM THAT OF CODEFENDANT CRUZ WAS DENIED.

Petitioner argues that his rights to due process of law and a fair trial were violated when he was forced to go to trial with codefendant Cruz. According to petitioner the joint trial resulted in his having to defend against not only the attacks of the prosecution, but also against codefendant Cruz. Thus, petitioner asks this Court to grant certiorari "to define that point at which the joint trial of criminal defendants with antagonistic defenses denies the criminal defendant his right to due process of law and a fair trial under the Fourteenth Amendment to the United States Constitution."

Respondent acknowledges that prior to trial petitioner and Cruz asked for separate trials and that the trial court denied those requests. Respondent also acknowledges that during trial both petitioner and Cruz attempted to deflect the prosecution's evidence by "pointing the finger" at each other. Respondent denies that the joinder resulted in the admission of evidence concerning other bad acts by petitioner that would have been inadmissible in a separate trial. As the Arizona Supreme Court held, the evidence of other bad acts would either have been admissible in a separate trial or was not so prejudicial as to require reversal. State v. McCall, No. 5482, slip op. at 5-7 (Ariz.Sup.Ct., Nov. 9, 1983.)

This Court has recognized the problems inherent in joint trials:

> This type of prejudicial effect is acknowledged to inhere in criminal practice, but it is justified on the grounds that (1) the jury is expected to follow instructions in limiting this

> evidence to its proper function, and (2) the convenience of trying different crimes against the same person, and connected crimes against different defendants, in the same trial is a valid governmental interest.

Spencer v. Texas, 385 U.S. 554, 562, 87 S.Ct. 648, 653, 17 L.Ed.2d 606, 613 (1967).

The United States Court of Appeals for the Ninth Circuit discussed the problems of antagonistic defenses in United States v. Brady, 579 F.2d 1121 (9th Cir. 1978), cert. denied, 439 U.S. 1074 (1979). The court first noted that a trial court's ruling on a motion to sever will rarely be disturbed. The court went on to state that conflicting and antagonistic defenses do not necessarily require a severance, even if the defendants attempt to blame one another. Looking at the evidence against the defendants, the appellate court found it only natural for one to try and place the blame on the other. The fact that a separate trial might offer a defendant a better chance of acquittal is not sufficient to require a severance. The court held that the ultimate question is whether, under all of the circumstances, it is within the capacity of the jury to follow the trial court's admonitory instructions and, correspondingly, whether they can collate and appraise the evidence against each defendant solely upon that defendant's own acts, statements, and conduct.

Other circuits have also held that the presence of antagonistic defenses does not mandate a severance. See, e.g., United States v. Horton, 646 F.2d 181 (5th Cir. 1981); United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979); United States v. Becker, 585 F.2d 703 (4th Cir. 1978), cert. denied, 439 U.S. 1080 (1979); United States v. Jenkins, 496 F.2d 57 (2d Cir. 1974), cert. denied, 420 U.S. 925 (1975). In United States v. Bornstein, 447 F.2d 742

(7th Cir.), cert. denied, 404 U.S. 851 (1971), the Seventh Circuit held that, although each defendant sought to escape conviction by placing the blame on the other, the defenses were actually compatible since both defendants claimed ignorance of the offenses charged. The District of Columbia Circuit has formulated a test similar to that adopted by the Ninth Circuit: a severance is necessary only when a defendant can show that the conflict between the defendants is so prejudicial that their defenses are irreconcilable, and that the jury will unjustifiably infer that this conflict alone demonstrates that both defendants are guilty. See United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977); United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977).

Additionally, various state courts have held that the granting or denial of a severance when antagonistic defenses exist remains a matter within the trial court's discretion. See, e.g., State v. Myrick, 228 Kan. 406, 616 P.2d 1066 (1980); State v. Barry, 25 Wash.App. 751, 611 P.2d 1262 (1980); Everett v. State, 238 Ga. 80, 230 S.E.2d 882 (1976). The Louisiana appellate courts go further and hold that, once a trial has ended, a trial court will not be found to have abused its discretion in denying a severance unless the defendant would probably not have been convicted following a separate trial. State v. McGraw, 366 So.2d 1278 (La. 1978).

Petitioner appears to be asking this Court to fashion a rule entitling a defendant to a severance whenever he has to spend a substantial portion of his time and energy at trial defending against a codefendant. Such a rule would be in conflict with Spencer v. Texas, supra, which seems to

call for a case-by-case analysis in resolving severance questions. The Arizona Supreme Court has done exactly this:

> We believe the approach adopted by the above-cited decisions strikes a proper balance between a defendant's interest in a fair trial and considerations of judicial economy. It is natural that defendants accused of the same crime and tried together will attempt to escape conviction by pointing the finger at each other. Whenever this occurs the co-defendants are, to some extent, forced to defend against their co-defendant as well as the government. This situation results in the sort of compelling prejudice requiring reversal, however, only when the competing defenses are so antagonistic at their cores that both cannot be believed. Consequently, we hold that a defendant seeking severance based on antagonistic defenses must demonstrate that his or her defense is so antagonistic to the co-defendants [sic] that the defenses are mutually exclusive. Moreover, defenses are mutually exclusive within the meaning of this rule if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant.
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> Applying this test to the instant case, we find that the defenses advanced by appellant [Cruz] and his codefendant [McCall] did not require severance. The core of appellant's defense was that he was not involved in the killings. In support of that theory appellant attacked the credibility of the state's key witness, Arnold Merrill, and presented evidence in an effort to minimize his own association with the killers from Chicago. He also presented evidence attacking the state's theory that he ordered the killings to obtain an interest in Graphic Dimensions and thereby participate in the profits from lucrative printing contracts with Las Vegas hotels. As a further defense tactic, he argued that the killings were the result of a robbery in which McCall and others had participated.
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> Similarly, the core of McCall's defense was that he was not involved in the killings. In support of that theory, McCall attacked Marilyn Redmond's identification of him and challenged the credibility of Merrill. He admitted that he had taken part in

> some burglaries but claimed he was not a killer. He also argued that the manner in which the victims were killed indicated that the motive for the killing was not robbery. The killings were, he argued, executions which someone else, possibly appellant, had ordered.
>
> While the alternative motives offered by the co-defendants -- robbery as opposed to execution -- were mutually exclusive, the core of each defense was not. The core of each defendant's defense was his own non-involvement; the "I didn't do it; he did it" stance of each defendant was peripheral to this core. Thus, the jury could have believed the core of the evidence offered by either defendant without disbelieving the core of the evidence offered by the other. Both defendants could have been found innocent. The jury could have believed McCall's claim that the killing was a hired execution in which he was not involved and, at the same time, believed appellant's claim that, he, appellant, had no motive to and did not order the execution. On the other hand, the jury could have believed appellant's claim that the motive for the killing was robbery and, at the same time, believed McCall's claim that Marilyn Redmond's identification of him was unreliable and that he, McCall, was not involved. Indeed, the jury could have rationally accepted the defense theory of both, or only one, or of neither defendant. The defenses were not mutually exclusive. Consequently, the nature of the defenses did not require severance.

State v. Cruz, supra, 672 P.2d at 473-74 (footnote omitted), cited with approval in State v. McCall, supra, slip op. at 3-4. Petitioner's point seems to be that he would have stood a better chance of acquittal at a separate trial. While respondent doubts this, the fact remains that the trial he did receive was fair.

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CONCLUSION

Because petitioner has failed to show a violation of any constitutional right, this Court should deny the petition for certiorari.

Respectfully submitted,

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Attorneys for RESPONDENT

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

GERALD R. GRANT, being first duly sworn upon oath, deposes and says:

That he served the attorney for the petitioner in the foregoing case by forwarding two (2) copies of respondent's RESPONSE TO PETITIONER FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

JAMES HAMILTON KEMPER
KEMPER & HENZE
45 West Jefferson, 11th Floor
Phoenix, Arizona 85003
Attorney for PETITIONER

this 1st day of May, 1984.

Gerald R. Grant
GERALD R. GRANT

SUBSCRIBED AND SWORN to before me this 1st day of May, 1984.

Barbara J. Orabuena
BARBARA J. ORABUENA
NOTARY PUBLIC

My Commission Expires:

September 28, 1986

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